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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 444

ALBERT J. WILD, PETITIONER

v.

BENNETT Y. BREWER, REVENUE AGENT OF THE INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The original majority and dissenting opinions (Pet. 1a–10a) of the court of appeals are reported at 329 F. 2d 924. The majority and dissenting opinions on rehearing (Pet. 11a–20a) have not yet been reported.

JURISDICTION

The original order of the court of appeals (R. 68)[1] was entered on March 19, 1964. A petition for rehearing was granted on June 2, 1964 (R. 77–78), and

[1] "R." references are to the certified transcript of record filed in this Court.

the final judgment of the court of appeals (R. 88) was entered on that date. The petition for a writ of certiorari was filed on August 31, 1964. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the sole shareholder of a corporation may refuse to comply with a statutory summons for production of the corporation's books and records on the ground that he might incriminate himself.

STATUTES INVOLVED

Internal Revenue Code of 1954:

> SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized--
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person

the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate, at a time and place named in the summons, and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

* * * * *

(26 U.S.C., 1958 ed., Sec. 7602.)

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) Jurisdiction of district court.

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.

Whenever any person summoned under sections 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is

> made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(26 U.S.C., 1958 ed., Sec. 7604.)

STATEMENT

Petitioner Wild is the president and sole stockholder of a corporation, Air Conditioning Supply Company. (R. 53–54.) Respondent Brewer, a special agent of the Internal Revenue Service, is investigating the income tax liabilities of the corporation for the fiscal years ending June 30, 1960, 1961, and 1962. (R. 4, 47–49.) In the course of his investigation the special agent issued a summons to Wild, under Section 7602 of the Internal Revenue Code of 1954, directing him to produce certain books and records of the corporation. (R. 7–9.) Wild appeared but refused to produce on the ground that, since he owned all the stock, the corporate records were his personal property and their production might tend to incriminate him. (R. 36–37.)

The special agent then instituted the present action by filing an application for a body attachment against Wild, under Section 7604 of the Internal Revenue Code of 1954, asking that Wild be brought before the district court to answer for his failure to obey the

summons. (R. 3.) The application was supported by the special agent's affidavit setting forth his assignment to investigate possible income tax delinquencies of the corporation, his issuance of the summons to Wild, and Wild's refusal to comply. (R. 4–6.) Notice of the application was served on Wild. (R. 6.)

At the hearing, Wild's counsel made little objection to the issuance of the body attachment, but asked for an immediate hearing on the merits. The district court, therefore, issued the attachment and proceeded with the hearing at once. (R. 22–24.) The government took the position that the sole stockholder of a corporation, when summoned to produce corporate books, cannot claim his personal privilege against self-incrimination. (R. 25–26.) Wild's position was that, as sole stockholder, he was the owner of the corporate records, and that an order directing him to produce them, over his claim of possible self-incrimination, would violate both the Fourth and Fifth Amendments. (R. 27–32.) The special agent testified to the issuance of the summons and Wild's refusal to comply (R. 32–42), and that it was necessary that he examine the corporate records in order to determine whether the corporation's income taxes had been fraudulently understated in its returns.* (R. 43–49). Wild testified that he owned all the stock of the corporation, hired and fired all its officers and employees, and had its books and records in his personal possession. (R. 54.) He admitted that the

*Apparently the special agent had some indication that certain checks had been received by the corporation but not reported in its returns. (R. 49–50.)

MICRO CARD 22.
TRADE MARK ®
MATTHEW BENDER & COMPANY
MB
CD205
59-59
m
microcard

corporation filed income tax returns, owned property and paid expenses by corporate checks, and that he himself filed individual returns. (R. 55–56.)

The district court found that the special agent, pursuant to his statutory authority, had issued the summons to Wild in the latter's capacity as an officer of the corporation; and that Wild had refused to comply on the ground that production of the corporate records might incriminate him. (R. 10–12.) The court concluded that the privilege against self-incrimination was inapplicable, and that corporation's records were a proper object of the summons. Wild was ordered to produce them. (R. 12.)

The original opinion of the court of appeals (Judge Koelsch, dissenting) reversed the order of the district court on the ground that the sole stockholder of a corporation may invoke his privilege against self-incrimination when ordered to produce corporate records. (Pet. 1a–10a.) On rehearing, however, the court (Judge Madden, dissenting) affirmed the district court's order of production in reliance on *Grant* v. *United States*, 227 U.S. 74, and *Wilson* v. *United States*, 221 U.S. 361. (Pet. 11a–20a.)

ARGUMENT

1. This Court has consistently held that a stockholder, officer, or other custodian of corporate records may not interpose his personal privilege against self-incrimination when called upon to produce corporate records in his possession. *Wilson* v. *United States*, 221 U.S. 361; *Wheeler* v. *United States*, 226 U.S. 478, 490; *Grant* v. *United States*, 227 U.S. 74, 79–80; *Essgee* v. *United States*, 262 U.S. 151; *United States* v.

White, 322 U.S. 694, 700; *Nilva* v. *United States*, 352 U.S. 385, 392; *Curcio* v. *United States*, 354 U.S. 118, 122, 124–125, 128. And in *Grant*, *supra*, the Court held that the privilege was unavailable even when the custodian was, as here, the sole stockholder of the corporation.[3]

Contrary to petitioner's suggestion (Pet. 8), *United States* v. *White*, *supra*, in no way departs from this settled principle. Most of the above cases upholding the right of public authorities to compel production of corporate records were based on the rationale that a corporation is chartered by the State for the benefit of the public and holds its special privileges and franchises subject to certain duties, including the duty to submit its books for examination upon demand by the proper authorities. See, *e.g.*, *Wilson* v. *United States*, *supra*, 221 U.S. at 380–385. In *White*, the Court explicitly reaffirmed that principle as to corporate records (322 U.S. at 700) and went even further, stating that "the absence of [State incorporation] as to a particular type of organization does not lessen the public necessity for making reasonable regulations of its activities effective, nor does it confer upon such an organization the purely personal privilege against self-incrimination." It was in that context—and solely with respect to unincorporated associations such as labor unions—that the Court laid down the test referred to by petitioner (Pet. 8), *i.e.*, "whether one can

[3] Similar arguments by sole stockholders have recently been rejected in two cases in the Second Circuit. *United States* v. *Fago*, 319 F. 2d 791, 792–793, certiorari denied, 375 U.S. 906; and *United States* v. *Guterma*, 272 F. 2d 344, 346.

fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only" (at 701).

2. In the district court petitioner's sole argument was that enforcement of the summons, over his claim of possible self-incrimination, would constitute a violation of both the Fourth and the Fifth Amendments. Petitioner now alleges (Pet. 5, 10–13) two additional violations of the unreasonable search and seizure provision of the Fourth Amendment: (1) that an Internal Revenue summons may not be used to develop evidence for use in a possible criminal case; and (2) that the government made no showing of necessity for examination of the corporation's books.[1] Neither of these arguments was properly preserved in the trial court. And both are without merit. As to the first, the courts of appeals have consistently held that a special agent may issue a summons in furtherance of an investigation which may possibly lead to a criminal prosecution. *Boren* v. *Tucker*, 239 F. 2d 767 (C.A. 9th); *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12 (C.A. 2d), certiorari denied, 373 U.S.

[1] Petitioner did not question the special agent's authority to issue the summons in the district court, and these arguments were first raised in his reply brief in the court of appeals. They are not referred to in any of the opinions in that court.

902; *Siegel* v. *Tyson*, 331 F. 2d 604 (C.A. 5th); *Tillotson* v. *Boughner*, 333 F. 2d 515 (C.A. 7th), petition for certiorari pending, No. 434, this Term. The two cases upon which petitioner relies[5] both involved the use of a summons after an indictment had actually been returned. As to the second argument, there are no cases suggesting that the government must offer evidence to support a summons concerning a taxpayer's liability during the three-year period before the statute of limitations has run. The cases upon which petitioner relies (Pet. 12) all involved investigations into tax years as to which the statute of limitations on assessment (26 U.S.C. 6501) had run in the absence of fraud, whereas the period of limitation was still open at the time the summons was issued in this case.[6] Furthermore, the necessity for the issuance of the summons is clear from the record. So far as appears, the special agent and a revenue agent (R. 49) were engaged in a first audit of the corporation's returns; the books and records were manifestly relevant to that investigation; and the agents had developed some evidence that certain checks payable to the corporation had not been included in its gross receipts (R. 49–50).

[5] *Application of Myers*, 202 F. Supp. 212 (E.D. Pa.), and *United States* v. *O'Connor*, 118 F. Supp. 248 (D. Mass.).

[6] Similarly, *Ryan* v. *United States*, No. 12, this Term, and *United States* v. *Powell*, No. 54, this Term, involve the different issue whether the government must offer evidence to support a subpoena issued after the statute of limitations has run.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1964.